

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Consumer and Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment on Interpretation of the	)	
Telephone Consumer Protection Act in Light of	)	
The D.C. Circuit's ACA International Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (“NCTA”) submits these comments in response to the *TCPA Notice* issued by the Consumer and Governmental Affairs Bureau in the above-captioned proceedings.<sup>1</sup>

**INTRODUCTION**

NCTA strongly supports the Commission’s efforts in this proceeding to reexamine its regulatory regime implementing the Telephone Consumer Protection Act of 1991 (TCPA). The *2015 TCPA Order* represented a dramatic expansion of the TCPA in a manner that exposed legitimate businesses to massive liability for communications that Congress never intended to prohibit.<sup>2</sup> In that *Order*, the Commission adopted an expansive interpretation of the term automatic telephone dialing system (ATDS) that covered any device with the potential capability to be used for robocalling, such as any smartphone, even if the device was not equipped with that

---

<sup>1</sup> Public Notice, CG Docket Nos. 18-152, 02-278, *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, DA 18-493 (May 14, 2018) (*TCPA Notice*).

<sup>2</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (*2015 TCPA Order*), *vacated in part*, *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (*ACA International*).

capability at the time a call is made.<sup>3</sup> The Commission also addressed the issue of calls to reassigned telephone numbers that are no longer held by the intended recipient of the call by establishing a “one call” safe harbor, again over the objection of Commissioners Pai and O’Rielly.<sup>4</sup> The Commission also ruled that customers may revoke consent to be called through “any reasonable means” that clearly expresses the desire not to receive further calls.<sup>5</sup>

In *ACA International v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit vacated key elements of the *2015 TCPA Order*. In particular, the court rejected the Commission’s overly broad definition of ATDS and the overly narrow safe harbor the Commission adopted for calls made to reassigned telephone numbers.<sup>6</sup> And while the court upheld the Commission’s “reasonable means” standard with respect to revocation of consent, it construed that standard narrowly, and made clear that the standard did not preclude “callers and consumers from contractually agreeing to revocation mechanisms” that would be binding on those consumers.<sup>7</sup>

NCTA appreciates the Commission’s prompt decision to seek comment on how best to move forward in light of the decision in *ACA International*. The *2015 TCPA Order* exposed all

---

<sup>3</sup> *2015 TCPA Order*, 30 FCC Rcd at 7974-78, ¶¶ 15-24. Commissioner (now Chairman) Pai and Commissioner O’Rielly issued strong dissents. *Id.* at 8075, Dissenting Statement of Commissioner Ajit Pai (“To put it kindly, the Order’s interpretation is a bit of a mess.”) (Pai Dissent); *id.* at 8087, Statement of Commissioner Michael O’Rielly Dissenting in Part and Approving in Part (“There are several problems with the new definition, which stem from FCC’s refusal to acknowledge a simple fact: to meet the definition of an autodialer, all of the statutory elements must be present.”) (O’Rielly Dissent).

<sup>4</sup> *2015 TCPA Order* at 8009-11, ¶¶ 89-93; Pai Dissent at 8080 (“According to the Order, callers are subject to strict liability after a single attempted call to a number that’s been reassigned to a new subscriber. Its interpretation is a veritable quagmire of self-contradiction and misplaced incentives.”); O’Rielly Dissent at 8091 (“Moreover, the idea that, after one call, a caller would have “constructive knowledge” that a number has been reassigned—even if there was no response—is absolutely ludicrous. The FCC expects callers to divine from mere silence the current status of a telephone number.”).

<sup>5</sup> *2015 TCPA Order* at 7993, ¶ 55.

<sup>6</sup> *ACA International*, 885 F.3d at 695, 706. The court found that its decision to vacate the safe harbor also required it to vacate the Commission’s treatment of reassigned numbers more generally. *Id.* at 708-09.

<sup>7</sup> *Id.* at 709-10.

types of companies, including cable operators, to unwarranted TCPA liability notwithstanding the efforts they undertake to comply with the TCPA and the Commission's TCPA rules. As described in the recent petition filed by the U.S. Chamber of Commerce, the *2015 TCPA Order* made it substantially more difficult for businesses to communicate with their customers and resulted in a dramatic increase in TCPA litigation.<sup>8</sup>

While the court struck down some of the most egregious elements of the *2015 TCPA Order*, there is an urgent need for the Commission to establish a new TCPA regulatory regime that provides certainty to companies and protection to consumers. Already different courts have reached different decisions as to how to interpret the TCPA following the *ACA International* decision, particularly with respect to the question of whether particular equipment satisfies the definition of ATDS for purposes of the TCPA.<sup>9</sup> Without clear guidance from the Commission, companies will be paralyzed in communicating with their customers and will continue to face a significant threat of unwarranted and very costly litigation.

In these comments, NCTA encourages the Commission to take three specific actions: (1) narrow the Commission's interpretation of what constitutes an ATDS; (2) limit unwarranted liability for inadvertent calls to reassigned numbers; and (3) clarify the requirements for revocation of consent. These three steps will restore certainty to the marketplace while continuing to protect consumers from the abusive calling practices that the TCPA was intended to address.

---

<sup>8</sup> Petition for Declaratory Ruling of the U.S. Chamber of Commerce, et al., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at 15-16 (May 3, 2018) (Chamber Petition).

<sup>9</sup> Compare, e.g., *Reyes v. BCA Fin. Servs.*, 2018 U.S. Dist. LEXIS 80690, at \*28-29 (S.D. Fla. May 14, 2018) (finding that pre-2015 Commission interpretations of ATDS remain valid), with *Marshall v. CBE Grp., Inc.*, 2018 U.S. Dist. LEXIS 55223 at \*17-18 (D. Nev. Mar. 30, 2018) (finding that court is not bound by the Commission's 2003 interpretation of ATDS in light of *ACA International*).

## **I. THE COMMISSION SHOULD NARROW THE DEFINITION OF AUTOMATIC TELEPHONE DIALING SYSTEM**

The most pressing question facing the Commission following *ACA International* is how best to interpret the statutory definition of ATDS, and in particular what it means for equipment to have the “capacity” to “store or produce telephone numbers to be called, using a random or sequential number generator” and to “dial such numbers.”<sup>10</sup> In the *2015 TCPA Order*, the Commission found that equipment had the requisite “capacity” even if it required the addition of software to perform the described functions.<sup>11</sup> The court appropriately rejected that overly expansive approach, finding that it is “untenable to construe the term ‘capacity’ in the statutory definition of ATDS in a manner that brings within the definition’s fold the most ubiquitous type of phone equipment known [i.e., smartphones], used countless times each day for routine communications by the vast majority of people in the country.”<sup>12</sup>

In light of the *ACA International* decision, NCTA encourages the Commission to clarify that “capacity” in the definition of ATDS means the present actual ability to perform the defined functions at the time a call is made. As Commissioner O’Rielly explained, “it seems obvious that the equipment must have the capacity to function as an autodialer *when the call is made* not at some undefined future point in time.”<sup>13</sup> Similarly, as Chairman Pai stated at the time, “[t]he

---

<sup>10</sup> *TCPA Notice* at 1-2.

<sup>11</sup> *2015 TCPA Order*, 30 FCC Rcd at 7974, ¶ 15.

<sup>12</sup> *ACA International*, 885 F.3d at 698. In addition to rejecting the Commission’s interpretation of the term capacity, the court also took issue with the Commission’s interpretation of the statutory functions a device must perform to be considered an ATDS. *Id.* at 703 (“The order’s lack of clarity about which functions qualify a device as an autodialer compounds the unreasonableness of the Commission’s expansive understanding of when a device has the ‘capacity’ to perform the necessary functions.”).

<sup>13</sup> O’Rielly Dissent, 30 FCC Rcd at 8088 (emphasis in original).

question of a thing's capacity is whether it can do something presently, not whether it could be modified to do something later on.”<sup>14</sup>

In addition, the Commission should rule that, in order to qualify as an ATDS, equipment must use a random or sequential number generator to both store numbers and dial those numbers without human intervention; and that these functions must be actually (not potentially or theoretically) present and active in a device at the time the call is made. This interpretation flows naturally from the statutory text and avoids the concerns identified by the court in *ACA International* when reviewing the Commission's prior expansive interpretation.<sup>15</sup>

The Commission also should clarify that only calls made using the equipment's ATDS capabilities are subject to the TCPA's restrictions. The D.C. Circuit specifically suggested this interpretive approach in *ACA International*,<sup>16</sup> and such a ruling would appropriately limit the possibility of TCPA liability to instances where callers actually use the kind of equipment that concerned Congress when it enacted the TCPA. Along the same lines, the Commission also should consider reaffirming that the TCPA's prohibition on the use of a “prerecorded or artificial voice” without consent is not triggered unless such a voice is actually played on a call.<sup>17</sup>

Adopting this more realistic interpretation of the ATDS definition will avoid the chaos that otherwise would result from disparate judicial interpretations of the statutory language. For example, after *ACA International*, some courts are treating as binding the Commission's prior

---

<sup>14</sup> Pai Dissent, 30 FCC Rcd at 8075.

<sup>15</sup> *ACA International*, 885 F.3d at 698.

<sup>16</sup> *See id.* at 703-04.

<sup>17</sup> *See Ybarra v. Dish Network, L.L.C.*, 807 F.3d 635, 641 (5th Cir. 2015) (concluding that “making a call in which a prerecorded voice might, but does not, play is not a violation of the TCPA”).

2003 and 2008 decisions interpreting the statutory language.<sup>18</sup> The Commission should make abundantly clear that its revised interpretation of the term ATDS overrides its prior interpretations of the term—including the 2003 order indicating that the term sweeps in devices that dial numbers from stored lists. In doing so, the Commission should reaffirm that where a device is used to dial specific, identifiable individuals, or to dial specified numbers from a non-random or non-sequential list of numbers, such a device is not an ATDS.

## **II. THE COMMISSION SHOULD LIMIT LIABILITY FOR CALLS TO REASSIGNED NUMBERS**

In addition to clarifying the definition of ATDS, there also is an urgent need for the Commission to address the question of liability for calls to reassigned numbers. The D.C. Circuit appropriately rejected the Commission’s “one call” safe harbor as arbitrary and capricious because that approach failed to account for the reality that a single call to the reassigned number “might give the caller no indication whatsoever of a possible reassignment.”<sup>19</sup> Based on this finding, the court concluded that it was necessary to vacate the Commission’s treatment of reassigned numbers more generally.<sup>20</sup>

To address this issue, the Commission should revisit the appropriate interpretation of the term “called party” in the TCPA – i.e., whether it refers to the customer that provided consent to call a number before giving up the number or the new subscriber to that number (who often has not provided consent). Although the court affirmed that the Commission “could permissibly

---

<sup>18</sup> See, e.g., *Maddox v. CBE Group, Inc.*, 2018 U.S. Dist. LEXIS 88568, at \*10 (N.D. Ga. May 22, 2018); *Swaney v. Regions Bank*, 2018 U.S. Dist. LEXIS 85217, at \*2 (N.D. Ala. May 22, 2018); *Reyes v. BCA Fin. Servs.*, 2018 U.S. Dist. LEXIS 80690, at \*28-29 (S.D. Fla. May 14, 2018).

<sup>19</sup> *ACA International*, 885 F.3d at 707.

<sup>20</sup> *Id.* at 708-09.

interpret ‘called party’ in that provision to refer to the current subscriber,” the court did not find that such an interpretation was required.<sup>21</sup>

The Commission should now adopt the more reasonable interpretation that the intended recipient should be treated as the called party, at least until the new subscriber of the telephone number informs the caller that the number has been reassigned. Chairman Pai’s dissent to the *2015 TCPA Order* explained why such an approach is warranted:

The expected-recipient approach respects Congress’s intent that the TCPA ‘balanc[e] the privacy rights of the individual and the commercial speech rights of the telemarketer.’ On the one hand, the expected-recipient approach gives individuals the right to stop unwanted, wrong-number phone calls in the first instance. Once an individual informs a caller that he has the wrong number, the caller can no longer expect to reach the party that consented and no longer claim to have to consent to continue calling. And so the expected-recipient approach rightfully sanctions the bad actors—often debt collectors—that repeatedly call after an individual has told them they’ve got the wrong number.

On the other hand, the expected-recipient approach gives legitimate businesses a clear and administrable means of complying with the law and engaging in ‘normal, expected or desired communications [with] their customers.’ A good actor can refuse to call anyone without first securing an individual’s consent, and a good actor can stop calling as soon as it learns that a number is wrong. Although taking these steps may not always be easy, they are an administrable means of complying with the statute and a way for any legitimate business to conduct its communications lawfully.<sup>22</sup>

The Commission also should consider reaffirming the “reasonable reliance” concept from the *2015 TCPA Order* and establishing a more robust safe harbor from TCPA liability that does not penalize callers that reasonably believe they have received the requisite consent to make the call. For example, the Commission should make clear that a caller is eligible for the safe harbor if it makes a good faith effort to confirm that the called person is the intended recipient (e.g., by

---

<sup>21</sup> *Id.* at 706.

<sup>22</sup> Pai Dissent at 8079.

consulting a database designed to identify reassigned numbers or by asking questions at the start of the call to determine if the call recipient is the same party that has provided consent).

The Commission also could consider providing some measure of relief by adopting a rule for reassigned wireless numbers similar to its approach for ported wireline numbers. In that context, a caller will not be held liable under the TCPA for calls within 15 days after the number has been ported.<sup>23</sup> Such an approach appropriately recognizes that during this initial period, the calling party has no reasonable means to discover that the number has been transferred. The court in *ACA International* suggested that such an approach would be within the Commission’s authority to adopt,<sup>24</sup> although a longer period after reassignment may be needed before a caller could possibly be able to discover the reassignment (e.g., by consulting a database of reassigned numbers).

### **III. THE COMMISSION SHOULD CLARIFY THE REQUIREMENTS FOR REVOCATION OF CONSENT**

While the D.C. Circuit upheld the *2015 TCPA Order*’s ruling addressing revocation of consent as a legal matter, there is still room for improvement in the Commission’s treatment of this issue from a policy perspective. The “any reasonable means” approach adopted in the *2015 TCPA Order* leaves open the possibility that customers can revoke consent through means that may seem reasonable to them, but that are not realistic given the allocation of responsibilities within a company. For example, while a customer may think that it is reasonable to revoke consent by informing a salesperson or technician that visits the customer’s home, those

---

<sup>23</sup> 47 C.F.R. § 64.1200(a)(1)(iv).

<sup>24</sup> *ACA International*, 885 F.3d at 708 (“If the goal were simply to provide an expanded opportunity to learn about a reassignment, the Commission presumably would have allowed for a given period of time.”).



employees may not have any meaningful ability to record and implement a customer's revocation of consent.

The Commission thus should begin by reconsidering its “any reasonable means” approach to consent revocation. While the D.C. Circuit upheld that approach as reflecting a *reasonable* interpretation of the TCPA, the court did not rule that it reflects the *only* possible interpretation.<sup>25</sup> And as a policy matter, the ruling improperly impairs callers’ ability to craft efficient and reliable mechanisms for receiving and processing revocations. Alternatively, in the event the Commission keeps the “any reasonable means” ruling in place, the Commission should specify what sorts of consent revocation are “reasonable.” On this note, the D.C. Circuit noted that callers can “mak[e] available clearly-defined and easy-to-use opt-out methods” and that any effort by customers to “sidestep the available methods in favor of idiosyncratic or imaginative revocation requests might well be seen as unreasonable.”<sup>26</sup> Consistent with that approach, the Commission should clarify that a provider may direct its customers to a particular web site and/or phone number if they wish to revoke their consent, and that as long as these options are “clearly-defined and easy-to-use,” a company should not be compelled to accept revocations received in other ways.

Additionally, while the *ACA International* court upheld the Commission’s prior interpretation of the TCPA as precluding “unilateral imposition of revocation rules by callers,” the court noted that the Commission had never specifically “address[ed] revocation rules mutually adopted by contracting parties.”<sup>27</sup> The Commission should do so now, by reaffirming the general rule that prior express consent “becomes irrevocable when it is integrated into a

---

<sup>25</sup> *Id.* at 709-10.

<sup>26</sup> *Id.* at 710.

<sup>27</sup> *Id.*

binding contract.”<sup>28</sup> The Commission should also make clear that callers and consumers also may agree to a binding consent revocation method as a matter of contract.

## CONCLUSION

The court in *ACA International* appropriately struck down the most egregious elements of the *2015 TCPA Order*, but now it is critical that the Commission provide guidance on how these issues should be handled going forward. For all the reasons explained above, the Commission should: (1) narrow the definition of what constitutes an ATDS; (2) limit liability for calls to reassigned numbers; and (3) clarify the requirements for revocation of consent.

Respectfully submitted,

**/s/ Steven F. Morris**

Steven F. Morris  
Stephanie L. Kuhl  
NCTA – The Internet & Television  
Association  
25 Massachusetts Avenue, N.W. – Suite 100  
Washington, D.C. 20001-1431  
(202) 222-2445

June 13, 2018

---

<sup>28</sup> *Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 58 (2d Cir. 2017).